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CLOSING THE GAP: DACA, DAPA, AND U.S. COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

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Political rhetoric and ongoing litigation that challenge the use of prosecutorial discretion and deferred action in immigration law often prominently feature claims that these initiatives demonstrate a lack of respect for the rule of law. This short essay seeks to highlight gaps between U.S. immigration law and its international human rights obligations and identify ways in which the use of discretion can advance rather than undermine the rule of law. In reconciling the ability of States to control matters of immigration with protections of family integrity, the touchstone in international law is balance. A State's right to expel a non-citizen resident for a legitimate state interest must be balanced against due consideration in deportation proceedings for a deportee's family connections and the hardship the deportation may have on the family, especially children. The non-citizen's right to remain is not absolute, but neither is the State's right to expel. U.S. immigration law's routine failure to provide any opportunity for decision makers to balance family equities against the need for enforcement violates international human rights law's demand for contextualization and nuance in the application of immigration controls. DACA and DAPA are flawed yet important mechanisms to permit the United States to inject respect for the rule of law into an otherwise rigid immigration system. Where decision makers are able to consider equitable factors in determining whether to proceed with immigration enforcement or exercise discretion, the United States moves a bit closer to compliance with its international human rights law obligations.

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I. INTRODUCTION

In 2012, the Department of Homeland Security (DHS) announced its Deferred Action for Childhood Arrivals (DACA) initiative.[1] Pursuant to this program, DHS articulated criteria under which certain noncitizens without lawful immigration status who had arrived in the United States as children could seek deferred action. Regarding the individuals eligible for prosecutorial discretion under DACA, in announcing this policy Secretary Napolitano noted:

> Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.[2]

She further stated that DACA was "necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."[3]

Two years later, DHS expanded DACA and announced a similar initiative, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), to allow certain undocumented parents of U.S. citizens and lawful permanent residents to seek deferred action.[4] In announcing this extension of DACA, Secretary

1. Memorandum of Janet Napolitano, Sec'y of Homeland Security, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children (June 15, 2012) (on file at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/H3BQ-MCET]).

2. *Id.*

3. *Id.*

4. Memorandum of Jeh Charles Johnson, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain

Johnson noted, "Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law."[5] Parents of U.S. citizen and lawful permanent resident children who are otherwise not enforcement priorities, Johnson we went on to say, generally:

> [A]re hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security.[6]

Political rhetoric and ongoing litigation that challenge both DACA and DAPA have prominently featured claims that these initiatives represent executive power grabs and demonstrate a lack of respect for the rule of law.[7] Others have persuasively rebutted such allegations through analysis of the strong legal authority and historical precedent for the use of prosecutorial discretion and deferred action[8] and by demonstrating how DACA and DAPA actually are "anchored in rule of law values, including consistency,

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Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file athttp://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [https://perma.cc/S8JH-5PUJ]; *see also* Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to the President, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014) (on file at http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [https://perma.cc/CL2A-K7HK]).

5. Sources cited *supra* note 4.

6. Sources cited *supra* note 4.

7. *See* Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. Rev. Disc. 58, 62-63 (2015).

8. *The Unconstitutionality of Obama's Executive Actions on Immigration, Hearing Before H. Comm. on the Judiciary*, 114th Cong., 1st Sess. at 30 (2015) (written statement of Stephen Legomsky) (concluding that, "[l]ike the overwhelming majority of other immigration law professors and scholars . . . I believe that the *legal* authority for both the Prosecutorial Discretion Memo and the DACA/DAPA Memo is clear).

transparency, accountability, and nonarbitrariness."[9] This short essay will not rehearse these arguments but rather will seek to introduce another consideration into the discussion by identifying ways in which DACA and DAPA can be responsive to instances in which the enforcement of U.S. immigration law defies the nation's obligations under international human rights law. As means to partially reconcile U.S. law with international law, DACA and DAPA advance rather than undermine the rule of law.

II. IMMIGRATION AND PROTECTIONS FOR FAMILIES IN INTERNATIONAL HUMAN RIGHTS LAW

International human rights law instruments loudly articulate the central importance of family. The Universal Declaration of Human Rights declares that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[10] The International Covenant on Civil and Political Rights and the American Convention on Human Rights echo this language.[11] Articles V and VI of the American Declaration on the Rights and Duties provide that every person has "the right to the protection of the law against abusive attacks upon his . . . private and family life" and "the right to establish a family, the basic element of society, and to receive protection thereof."[12] Article VII of the American Declaration provides that "all children have the right to special protection, care and aid" and Article IX provides that "every person has the right to the inviolability of his home."[13] Indeed, the importance of family is set forth in virtually all major international human rights instruments.[14]

9. Kalhan, *supra* note 7, at 66.

10. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 at art. 16(3) (1948).

11. International Covenant on Civil and Political Rights art. 23(1), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the U.S. Sept. 8, 1992) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."); American Convention on Human Rights art. 17(1), Nov. 22, 1969, 9 I.L.M 673 (1970) ("The family is the natural and fundamental group unit of society and is entitled to protection by society and the state").

12. American Declaration of the Rights and Duties of Man art. XXVI, O.A.S. Res. XXX, adopted May 2, 1948, *available at* http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm [perma.cc/R4YM-SWD2].

13. *Id.*

14. *See, e.g.,* African [Banjul] Charter on Human and Peoples' Rights art. 18(a), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) ("The family shall be the

Although the word "family" is not mentioned in the U.S. Constitution, the importance of protecting families is as firmly entrenched in U.S. law as it is internationally, at least outside the context of immigration. As the Supreme Court notes, "the interests of parents in the care, custody and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by the Court."[15] In *Meyer v. Nebraska*, the Court recognized:

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[16]

The Court further emphasized the special protection afforded the relationship between parents and children in *Pierce v. Society of Sisters* when it noted that "[t]he child is not the mere creation of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[17] The Court occasionally is in disagreement regarding the constitutional rationale for extending protection to the parent-child relationship, but there is no ambiguity in the Court's affirmation of limits on interference regarding this relationship.[18]

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natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov 4, 1950, 213 U.N.T.S. 222 (entered into force Dec. 3, 1953) ("Everyone has the right to respect for his private and family life . . ."); International Covenant on Economic, Social and Social Rights art. 10(1), Dec. 16, 1966, GA Res. 2200 (XXI), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society…").

15. Troxel v. Granville, 530 U.S. 57, 65 (2000); *see generally* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Santosky v. Kramer, 455 U.S. 745 (1982).

16. *Meyer*, 262 U.S. at 399.

17. *Pierce*, 268 U.S. at 535.

18. *See e.g.*, *Troxel*, 530 U.S. at 57 ("[A]t least eight justices affirmed that the Constitution protects the parent-child relationship from undue governmental interference, although a majority of justices could not agree on a rationale for the decision."); s*ee generally* Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS L. REV. 509, 515 (2010).

As I have discussed at length elsewhere, there is "tremendous potential for inconsistency as immigration law and family law intersect. The vindication of immigration law goals often results in the compromise of family integrity, and achievement of family integrity often can be accomplished only in violation of immigration laws."[19] In many instances, the enforcement of U.S. immigration law:

> [C]reates searing family narratives of separation, hardship, and trauma, yet immigration law ignores these compelling stories and renders them legally irrelevant. Removal proceedings provide no opportunity or framework to hear the voices of those most directly and deeply affected by the enforcement of immigration law. By narrowing what is relevant, deportation is accomplished without having to confront the reality evidenced by the voices and narratives of immigrant families. Things that matter deeply—family separation, hardship and trauma—are swept aside.[20]

This failure to engage with the realities of deportation for families and children is a principal reason that U.S. immigration law is at odds with international human rights law.

In reconciling the ability of states to control matters of entrance and residence with protections of family integrity, the touchstone in international law is balance. For example, in *Stewart v. Canada* the U.N. Human Right Committee noted that, under international law, a State's right to expel a non-citizen resident for a legitimate state interest must be balanced against due consideration in deportation proceedings for a deportee's family connections and the hardship the deportation may have on the family.[21] The European Court of Human Rights struck a similar balance:

> It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8 (art. 8-1) [right to private and family life], be

19. David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1165 (2006).

20. David B. Thronson, *Unhappy Families: The Failings of Immigration Law for Families That Are Not All Alike*, *in* THE NEW DEPORTATIONS DELIRIUM: INTERDISCIPLINARY RESPONSES (Daniel Kanstroom & M. Brinton Lykes, eds., NYU Press 2015).

21. Stewart v. Canada, Comm. No. 538/1993, U.N. Hum. Rts. Comm., ¶ 12.10, U.N. Doc. CCPR/C/58/D/538/1993 (Dec. 16, 1996).

> necessary in a democratic society, that is to say, justified by a pressing social need and proportionate to the legitimate aim pursued.[22]

The individual's right to remain is not absolute, but neither is the State's right to expel.[23]

The Inter-American Commission on Human Rights (IACHR) has noted that in striking the balance between control of immigration and family, the European Court and the U.N. Human Rights Committee have "considered a variety of elements in balancing a deportee's rights to remain in a host country and a state's interest to protect its citizenry and other individuals under its jurisdiction."[24] These elements include: the age at which the non-citizen immigrated to the host State; the non-citizen's length of residence in the host State; the non-citizen's family ties in the host State; the extent of hardship the non-citizen's deportation poses for the family in the host State; the extent of the non-citizen's links to the country of origin; the non-citizen's ability to speak the principal language(s) of the country of origin; and the nature and severity of any criminal offenses committed by the non-citizen. In analyzing a claim that U.S. immigration law violated protections for family and children under the American Declaration, the IACHR noted that "[b]oth the Inter-American Commission and the European Court have recognized that under international law the best interest of a deportee's citizen children must be duly considered in any removal proceeding."[25]

As the IACHR articulated in their 2000 report, U.S. immigration law's routine failure to provide an opportunity for decision makers to balance family equities against the need for enforcement violates

22. C. v. Belgium, No. 35, 541 Eur. Ct. H.R. 627 at ¶ 31, No. 35/1995/541/627 (June 24, 1996); s*ee also* Beldjoudi v. France, No. 12083, Eur. Ct. H.R. 86 at ¶ 74 (Judgment of March 26, 1992).

23. Wayne Smith, Hugo Armendariz et al. v. United States, Case 12.562, Inter-Am Comm'n H.R., Report No. 81/10, ¶ 58 (2010) ("[T]he European Court and the U.N. Human Right Committee's decisions in this area demonstrate that a deportee's establishment of a family or private ties to a host country does not establish an immutable right of a non-citizen to remain in the host country. . . . The Commission finds that a balancing test is the only mechanism to reach a fair decision between the competing individual human rights and the needs asserted by the State.").

24. *Id.* at ¶ 54.

25. *Id.* at ¶ 57 (July 12, 2010); *see also* Andrea Mortlock v. United States, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08, ¶ 78 (July 25, 2008) ("[I]mmigration policy must guarantee to all an individual decision with the guarantees of due process: it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection.").

international human rights law's demand for contextualization and nuance in the application of immigration controls:

> Given the nature of Articles V, VI and VII of the American Declaration…where decision-making involves the potential separation of a family, the resulting interference with family life may only be justified where necessary to meet a pressing need to protect public order, and where the means are proportional to that end. The application of these criteria by various human rights supervisory bodies indicate that this balancing must be made on a case by case basis, and that the reasons justifying interference with family life must be very serious indeed.[26]

Where persons deported from the United States "had no opportunity to present a humanitarian defense to deportation or to have their rights to family duly considered before deportation," the IACHR found the United States in violation of "rights under Articles V, VI, and VII of the American Declaration by failing to hear their humanitarian defense and duly consider their right to family and the best interest of their children on an individualized basis in their removal proceedings."[27] The Commission clarified and emphasized that "removal proceedings for non-citizens must take due consideration of the best interest of the non-citizens' children and a deportee's rights to family, in accordance with international law."[28]

After finding the United States in violation of international human rights law, the IACHR recommended remedial actions in the individual case including "a competent, independent immigration judge to apply a balancing test to . . . individual cases that duly considers their humanitarian defenses and can provide meaningful relief and that the United States "[i]mplement laws to ensure that non-citizen residents' right to family life, as protected under Articles V, VI, and VII of the American Declaration, are duly protected and given due process on a case-by-case basis in U.S. immigration removal proceedings."[29] Subsequently, the Commission found that the United States "has not taken measures toward compliance with the recommendations in the merits report in this case.[30]

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26. Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, doc. 70 rev. ¶ 166 (2000).

27. Smith et al. v. United States, Case 12.562, Inter-Am Comm'n H.R., Report No. 81/10, ¶¶ 59-60 (July 12, 2010).

28. *Id.* at ¶ 57.

29. *Id.* at ¶ 67.

30. *Id.* at ¶ 71; *see also* Hugo Armendariz v. United States, Case 526-03, Report No. 57/06, Inter-Am. C.H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1, ¶ 30 (2007), *available at*

III. DACA, DAPA, AND INTERNATIONAL LAW

The laundry list of considerations used by international tribunals has much in common with the guidelines for the exercise of prosecutorial discretion under DACA and DAPA. DACA criteria include age of arrival in the United States, residence and ties to this country, and review of any criminal activity.[31] Similarly, DAPA criteria include residence and ties to the United States, consideration of criminal activity, and the presence of children.[32] Certainly, cut-off dates and rigid barriers to eligibility for DACA and DAPA based on past criminal activity mean that not all will have a balancing of equitable factors conducted by competent, independent immigration judges as the Commission recommended. But even the baseline opportunity that decision makers consider equitable factors in determining whether to proceed with immigration enforcement or exercise discretion to at least temporarily forego removal moves the United States a bit closer to compliance with international human rights law.

Choices are inevitable in determining where scarce enforcement resources will be utilized. "Congress knows that there are about 11 million undocumented immigrants living in the U.S., and it knows that the resources it is appropriating enable the Administration to go after fewer than 400,000 of them per year, less than 4% of that population."[33] In such a situation, the choice to establish enforcement priorities that improve the United States' compliance with its international human rights law obligations in no way demonstrates a lack of respect for the rule of law. Honoring the rule of law encompasses much more than unthinking application of inequitable laws. It requires "proportionality, procedural fairness, and the rejection of Draconian 'one size fits all' solutions to complex social problems."[34] DACA and DAPA are flawed yet important mechanisms

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cidh.org/annualrep/2006eng/USA526.03eng.htm [https://perma.cc/VD54-TCE3] ("According to the long-standing practice and jurisprudence of the inter-American human rights system . . . the American Declaration of the Rights and Duties of Man constitutes a source of international obligation for the United States and other OAS Member States that are not parties to the American Convention on Human Rights.").

31. Memorandum of Janet Napolitano, *supra* note 1.

32. Memorandum of Jeh Charles Johnson, *supra* note 4.

33. *The Unconstitutionality of Obama's Executive Actions on Immigration, Hearing Before H. Comm. on the Judiciary*, *supra* note 8, at 3.

34. Daniel Kanstroom, *Two Misunderstandings About Immigration,* GEO. MASON UNIVERSITY'S HISTORY NEWS NETWORK (Nov. 12, 2007), *available at* http://hnn.us/articles/44095.html [https://perma.cc/C6NM-R6Q9].

to permit the United States to inject respect for the rule of law into an otherwise rigid immigration system.